NO. 49245-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

STEVEN NICOLAS RUSSELL,
ALEJANDRO RAMIREZ and
DANIEL GALEANA-RAMIREZ
Appellants.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE STEVEN E. BROWN, JUDGE

BRIEF OF RESPONDENT

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INTRODUCTION

This single brief is intended to reply to all three Briefs of Appellants filed on behalf of co-Defendants and co-Appellants Steven Russell, Alejandro Ramirez and Daniel Galeana-Ramirez, as many of the assignments of error are similar, and Russell and Galeana have adopted the assignments of error of their co-Defendants.

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RESPONSE TO ASSIGNMENTS OF ERROR

1. **The cell phone data that was introduced at trial was not testimonial and the examiner who extracted the data was not a "witness against" the Defendants, so they had no constitutional right to confront him (Russell's assignment of error #1 & Ramirez' assignment of error #3.)**

2. **The jury expressed unanimity through special verdicts for the charges with alternatives, although there was substantial evidence presented to support all alternatives (Ramirez' assignment of error #1 & Galeana's assignment of error I.)**

3. **Defendants Ramirez and Russell committed an assault, more than a mere use of force, which had independent purpose and effect and which prevents the charges from merging (Russell's assignment of error #2 & Ramirez' assignment of error #4.)**

4. **Defendant Russell's Judgment & Sentence contains a scrivener's error as to which counts the firearm enhancements were imposed upon (Russell's assignment of error #3).**

5. **These cases were properly joined for trial because there was only a disparity of the <u>type</u> of evidence against Defendant Ramirez, not the amount, and the facts were inextricably intertwined (Ramirez' assignment of error #2)**

6. **Cumulative error doctrine is inapplicable (Ramirez' assignment of error #5.)**

7. **Defendant Galeana's trial counsel was not ineffective for failing to probative evidence that linked Galeana to the recovered firearm (Galeana's assignment of error II.)**

8. **No opinion as to Defendant Galeana's guilt was given, simply evidence of his arrest (Galeana's assignment of error III.)**

9. **RAP 14.2 now governs costs for indigent appellants (Galeana's assignment of error IV.)**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

Agustin Morales Gamez[1] is a 51 year old man from El Salvador. RP 6/29/2016 at 88. He has never been to school and cannot spell even his own name. *Id*. at 87-88. At the time of this incident, he lived in Aberdeen with Jose Leiva Aldana and he picked bear grass and salal for a living. *Id*. at 89.

Jose Leiva Aldana is also from El Salvador. RP 6/30/2016 at 92.[2] Although he went to school for a short time, he cannot spell either; even his own name. *Id*.

On October 24, 2015, Mr. Morales and Mr. Leiva had some beer at home, went to a bar, and left sometime between 11:30 and midnight. RP 6/29/2016 at 91; RP 6/30/2016 at 93. On their way home, in an alley close to their home, they were assaulted by multiple individuals. RP 6/29/2016 at 92; 6/30/2016 at 94. This event was captured on video cameras installed at the Aberdeen Fire Department. RP 7/1/2016 at 340. Video of

[1] This witness' name conforms to traditional Spanish language naming conventions in which the first surname (the patronymic) is considered the "last name." The second surname, the matronymic, is only used in situations that an English speaker would use a middle name, for example, in an initial introduction. Therefore, this witness will be henceforth referred to as Mr. Morales, Jose Leiva Aldana will be referred to as Mr. Leiva and Daniel Galeana Ramirez as Defendant Galeana.

[2] The State's copies of the Report of Proceedings for June 30, July 1, 6 & 7, 2016 all have the same cover page, which erroneously indicates the dates of January 4, 2016 and June 17, 2016. The references to the dates are based upon the contents of those volumes.

the event was introduced at trial as exhibits 62 and 63. RP 7/1/2016 at 345, *and see* Exs. 62 & 63.

Mr. Morales described the incident as "a problem." RP 6/29/2016 at 90. He testified that he was hit in the head with something metal and fell to the ground. *Id*. at 93. He said "they" wanted their money and wallet. *Id*. at 92. He said they took his phone. *Id*. at 95.

Mr. Morales said that he defended himself with a knife. *Id*. at 96. He testified there were four attackers; that two people attacked him, and two people attacked Jose. *Id*. at 97-98. He said he thought the shorter of the attackers lived nearby, and Mr. Morales described him as "*guero*." *Id*. at 99. Later, a Spanish interpreter who had interpreted for Mr. Morales and Mr. Leiva explained that "*guero*" could be translated as a light skinned person, a non-Chicano, or even blond. RP 7/6/2016 at 540-41.

Mr. Morales also testified that he asked a lady to call the police, but he didn't talk to her because she was inside. RP 6/29/2016 at 101. He said he was dizzy due to the blow to the head. *Id*. at 105.

Mr. Leiva testified that the young men tried to rob them and beat them up. RP 6/30/2016 at 94. He said they asked for money and tried to get in their pockets and take their wallet. *Id*. at 95. He said that the attackers had something black, like a weapon. *Id*. He said that it was a

type of "arm" and that they had hit his compadre with it. *Id*. at 96. Mr. Leiva also said that Mr. Morales had struck at the attackers with his knife. *Id*. at 145. He said that he saw a gun in the hands of the attackers. *Id*. at 145. Under cross examination, Mr. Leiva said that the assailants were both blond and Hispanic. *Id*. at 109. He said there were four attackers. *Id*. at 110.

The video shows two attackers who run at Mr. Leiva and Mr. Morales from behind, accost and assault them. Two individuals (later identified as Aaron Johnson and Nicole Smith) come out of their house to watch, and the two assailants run off in the direction they came. *See* Exs. 62 & 63.

Nichole Smith testified that she saw "two guys beating up two Hispanic guys …." RP 6/29/2016 at 18. Ms. Smith testified that "They were punching and kicking at them…." *Id*. at 19. Ms. Smith testified that the victims asked her to "call the cops" and kept saying "pistol." RP 6/29/2016 at 20. Ms. Smith later identified Defendant Russell as one of the assailants from a photo line-up. RP 7/1/16 at 280, Ex. 26. Ms. Smith also identified Defendant Russell in the courtroom. RP 6/29/2016 at 26. Ms. Smith said the other assailant was wearing a black "hoodie" that was too big for him and that covered his face. RP 6/29/2016 at 20.

Aaron Johnson said the assailants were "hitting them full fist, feet. They were just kicking them and hitting them." RP 6/29/2016 at 48. Mr. Johnson also identified Defendant Russell as one of the assailants in the courtroom. RP 6/29/2016 at 53. Later, Detective Jon Hudson testified Mr. Johnson had identified Defendant Russell in a photo line-up the day after the incident. RP 7/1/2016 at 283. Mr. Johnson said that the other assailant was wearing a big black oversized hoodie. RP 6/29/2016 at 49.

Detective Jason Perkinson of the Aberdeen Police was working security at Grays Harbor Community Hospital on October 24, 2015, from 6:00 PM to 3:00 AM. RP 6/30/2016 at 158. He saw Defendants Russell and Ramirez come into the emergency room. *Id*. at 159-60. He later learned that Defendant Ramirez had a stab wound near his rib cage. *Id*. at 163. Detective Perkinson later reviewed a security video and saw that Defendant Ramirez had been wearing a black sweatshirt or jacket when he came in. *Id*. at 167. He also saw that they had come in at about midnight. *Id*. at 169. Shortly afterwards Defendant Russell returned to the hospital with Defendant Galeana. *Id*. at 171. At about 1:40 AM Detective Perkinson became aware that Defendants Russell and Galeana had left the hospital. RP at 175.

Mr. Morales testified that they left the police station around 2:00 AM. RP 6/29/2016 at 105. He said that "they" were waiting for them and "they" shot Jose. *Id*. at 106. Mr. Morales said that four people had a gun, but when asked how many people had a gun *in their hands* he said only one. VRP 6/29/2016 at 106. Mr. Morales said that some shrapnel hit him on the boot. *Id*. He said that the person who shot them was Hispanic. *Id*. at 107.

Mr. Leiva said that as they were coming home "they" were back. RP 6/30/2016 at 100. Mr. Leiva testified that he was shot in the stomach. *Id*. at 102. He testified that, at the hospital, he was in pain from his injuries. RP 6/30/2016 at 139. He testified that Daniel Galeana shot him, and that he knows Daniel Galeana's name because he knows members of Galeana's family. RP 6/30/2016 at 104.

Detective Cox arrived at the hospital the next morning at 8:30 AM. RP 7/1/2016 at 322. Mr. Leiva was still in a hospital bed. *Id*. at 324. He looked at several photos, but when he came to Defendant Galeana's photo, he set it aside, and later indicated that was the person who shot him. *Id*.

Sergeant Casey Wagonblast responded to the hospital and seized a black hooded sweatshirt from Defendant Ramirez' hospital room. RP 6/30/2016 at 195. Sgt. Wagonblast noted that the sweatshirt was an extra-

large, which seemed awfully large for a man of Defendant Ramirez' stature. *Id*. at 196. The sweatshirt had a hole and a blood stain on it. *Id*. at 197.

A smashed cell phone was found in a puddle of water at the scene of the assault and robbery. RP 6/19/2016 at 14. Mr. Johnson handed it to Officer Blodgett, who gave it to Officer Glaser. *Id*. at 14-15. Officer Glaser placed it in to evidence. *Id*. at 17. Detective Cox requested the phone be sent to Dixie State University on February 3. *Id*. at 19. The purpose was for a "chip off" examination to extract data from the phone. *Id*. Detective Cox had never used this institution to examine a cell phone before, and had no knowledge of this agency using it previously. *Id*. Detective Cox received the phone back on February 9 with a CD. *Id*. at 22. The CD contained several hundred pages of data. *Id*.

Dixie State University received the phone on February 4, 2016. *Id*. at 33. The phone data was extracted from the phone's chip by William Matthews, at the time the director of the institute. *Id*. at 42. At the time of trial, Mr. Matthews no longer worked at Dixie State. *Id*. Joan Runs Through, the assistant director and a lab examiner, testified. *Id*. at 24-25. Dixie State's records indicated that Mr. Matthews accepted the phone on the 4th, and the work completed on the 5th. *Id*. at 52. The process used

cannot write data to the chip. *Id*. at 39. Ms. Runs Through testified that there is nothing an examiner can do to alter the data from the chip, only damage it, in which case it becomes unreadable. *Id*. at 44-45. Ms. Runs Through explained that if the temperature were too high while melting the glue on the chip, it would destroy the data on the chip. *Id*. Ms. Runs Through testified that she looked at the information that was pulled off the phone, and it appeared that the process had worked correctly. *Id*. at 61. Ms. Runs Through testified that she routinely reviews the work of others, since she is an instructor in this process. *Id*. at 59.

Detective Cox testified about the data on the phone. RP 7/1/2016 at 357. He discovered that the email addresses "snrussell.89@gmail.com" and "snrussell030489@gmail.com" appeared on the phone, associated with the calendar application. *Id*. at 358 *and see* Ex. 52. Detective Cox knew Defendant Russell's birth date to be 03041989 (March 4, 1989.) RP 7/1/2017 at 358. Detective Cox also testified that the instant messaged extracted from the phone had the name "Steven Russell" associated with them. *Id*. at 378 *and see* Ex. 65. From these clues, he deduced that the phone belonged to Defendant Steven Russell. RP 7/1/2016 at 378.

Detective Cox also testified regarding the records of the communications extracted from the phone. *Id*. He testified that Exhibit

64 was the "Inbox" of text messages, and Exhibit 58 were the sent messages. *Id*. at 379-80. He explained that the time stamp on the messages were seven hours earlier than local time. *Id*. at 381. Detective Cox testified that he saw messages from a contact named "Silent" whose phone number was (360) 581-0288 in the phone, dated the night of the incidents. *Id*. at 382. Detective Cox explained that he looked this phone number up in a police database and discovered that the number had been affiliated with Defendant Ramirez. *Id*. at 384-85. Detective Cox also testified that he learned Defendant Ramirez had the word "Silent" tattooed on his right upper arm. *Id*. at 385-86 *and see* Ex. 3 & 4. Detective Cox testified that the messages appeared to be an invitation sent by Defendant Russell to Defendant Ramirez inviting him to come drink a beer at about 7:00 PM on the date of the incidents. *Id*. at 387-88.

On November 10, 2017, Officer Jason Capps of the Aberdeen Police retrieved a .38 special pistol from a person named Josiah Rhodes. RP 7/1/2017 at 415. Mr. Rhodes requested that Officer Capps take the weapon. RP 7/6/2016 at 436. Officer Capps was not looking for this revolver when it was presented to him. RP 7/6/2016 at 437. He did eventually cite a Rigo Rivera for possessing the firearm in question. *Id*.

Detective Cox found out about the pistol Officer Capps had seized. *Id*. at 493. Detective Cox believed that the firearm used in the shooting of Mr. Leiva and Mr. Morales was a revolver. *Id*. at 494. Detective Cox also knew that Rigo Rivera knew Defendant Galeana. *Id*. This was proved when both Rivera and Galeana's names were found in Defendant Russell's cell phone. *Id*. Detective Cox had the pistol sent to the Washington State Patrol Crime Lab for analysis, along with a recovered bullet from the scene of the shooting. RP 7/6/2016 at 494.

Johann Schoemann, a firearms and toolmark examiner with the Washington State Patrol Crime Lab testified. RP 7/6/2016 at 465. He examined the recovered .38 revolver and the fired bullet. *Id*. at 470. He concluded that the recovered bullet was fired from the .38 revolver Officer Capps had recovered. *Id*. at 480.

ARGUMENT

1. The examiner who extracted the cell phone data was not a "witness against" the Defendants, so they had no right to confront him (Defendant Russell's assignment of error #1 & Defendant Ramirez' assignment of error #3.)

The Defendants[3] claim that the introduction of the data on Defendant Russell's cell phone into evidence, without the testimony of William Matthews, the person who extracted that data, violates their right to confront a witness against them. However, the Defendants fail to identify a single statement made by Mr. Matthews that was introduced at trial. Instead, the Defendants imply that the cell phone data (which was characterized as a "report") contains the opinion of an expert, rendering it testimonial. This is untrue. In fact, neither Mr. Matthews nor the cell phone examiner who did testify were "witnesses against" the Defendants, because nothing they could have said identified or inculpated any of the three.

The cell phone data is nontestimonial and contains no conclusions from the cell phone examiners.

In the instant case excerpts of the cell phone data were admitted, specifically exhibits 42 (RP 6/30/2016 at 70), 58 (RP 7/1/2016 at 380), 64 (RP 7/1/2016 at 379) and 65 (RP 7/1/2016 at 377). Additionally, exhibit

[3] Defendant Galeana adopted this assignment of error by reference.

32, a thick binder, was identified as the contents of the phone, but not admitted. RP 6/30/2016 at 68-69. It contains machine-generated data and the contents of text messages sent and received by the owner of the phone.

Nothing Ms. Runs Through said on the stand identified or inculpated any of the Defendants. Ms. Runs Through could not identify who the phone belonged to, what the phone number was, or the email address of the user. RP 6/30/2016 at 71. Ms. Runs Through even testified that examiners who perform this work do not typically even look at the data they extract. RP 6/30/2016 at 71. They simply handled and manipulated evidence and machines, and their role was to establish chain of custody and explain how the data extraction process worked.

Criminal defendants have a right to confront witnesses whose testimony identifies and inculpates, not laboratory technicians.

"[T]he Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" *Williams v. Illinois*, 567 U.S. 50, 70, 132 S. Ct. 2221, 2235, 183 L. Ed. 2d 89 (2012) (quoting *Crawford v. Washington*, 541 U.S. 36, 59-60 n. 9, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).) "If the witness's statements help to identify or inculpate the defendant, then the witness is a 'witness against' the defendant." *State v. Lui*, 179 Wn.2d 457, 480, 315 P.3d 493, 504 (2014). "This definition does not sweep in analysts whose

only role is to operate a machine or add a reagent to a mixture." *Id*. at 480. "[M]erely laying hands on evidence… does not a 'witness' make – something more is required." *Id*. at 481. Without more, neither chain of custody or laboratory work is a confrontation clause issue. *Id*. at 498. The State confrontation right provides no greater protection than the analogous federal right. *Lui*, at 468.

In *Lui* the Washington Supreme Court found that an allele table, which appears as "a whole bunch of numbers that kind of look like gobbledygook," did not identify or inculpate anyone without DNA expert interpretation. *Lui* at 488-89. The *Lui* court ruled that the defendant's confrontation right applied to the expert who interpreted the "gobbledygook," because it was only through this expert's testimony that "the DNA profiles gained their inculpatory character…." *Id*. at 489. The *Lui* court found that the defendant did <u>not</u> have a right to confront every analyst that participated in the process of producing a DNA profile, but only the "accuser" who identified the defendant from that profile. *Id*. at 498.

This is analogous to the situation here, except the "accuser" was Detective Cox, rather than someone from the laboratory. The data from the cell phone was meaningless without someone to interpret and apply it.

On its own, it did not identify or inculpate anyone. Only after Detective Cox and the other officers, who did testify, explained that the cell phone was found at the scene, and the email addresses and contacts within indicated that the phone was Russell's, and that Russell had apparently invited Ramirez to hang out on the night in question, did that data identify and inculpate them.

Consider an analogy with more a familiar technology. Instead of a cell phone, say the police find a smashed audio cassette tape at a crime scene. Because the cassette is smashed, the tape cannot be played. The police send the cassette tape to an audio engineer who disassembles the plastic cassette, loads the magnetic tape inside onto reels, then uses a reel-to-reel player to dub the audio onto a new cassette. The new cassette is sent back to the police. A police officer listens to the audio from the new cassette, determines it has evidentiary value, and testifies about his determination at trial.

In this analogous situation, the audio engineer might be called to establish the chain of custody of the tape, and perhaps to explain the process, but nothing he says identifies or inculpates the defendant, so he does not "bear testimony." The police officer who explains the evidentiary value of the recording does.

Further, no one would argue that the audio on the tape was created in anticipation of litigation, as the Defendants argue.

The data on the cell phone was not created in anticipation of litigation.

The Defendants also assert that the data on the smashed cell phone is "testimonial" because it was prepared to aid the Aberdeen Police Department in their investigation. That is untrue. It was merely *extracted* in furtherance of the police investigation.

The information on the cell phone was undoubtedly created before the phone was smashed and became inoperable, before the assault on Mr. Morales and Mr. Leiva. Even if this were not obvious, Detective Cox testified as to the times that the text messages were sent as being hours before the assault.

It could be argued that the data was *extracted* in anticipation of litigation, but that is unimportant. The video of the robbery and assault was also extracted from the fire department's camera systems for the same purpose. No one would call a video taken by an unmanned surveillance camera as being prepared in anticipation of litigation.

The Defendants confronted the witness whose testimony identified and inculpated them – Detective Cox.

The court below did err when it ruled on June 22, 2016 that the confrontation clause required live testimony concerning the data extraction from the phone. But that ruling did not prejudice the Defendants. Especially since the State did produce a live witness to establish the chain of custody and describe the data extraction process. The Defendants were able to confront and cross-examine her about her lack of knowledge of the particular phone in question and the facts surrounding William Matthews' termination and other irrelevant topics.

As in *Lui*, the Defendants' confrontation rights attach to those witnesses who interpret the data in a way that that identifies and/or inculpates them, that is, those who "bear testimony." This was not William Matthews, who merely operated a machine and received a result, but the detective who used that information to identify and inculpate Ramirez and Russell. Because Detective Cox testified in person about how he used that cell phone data to identify Russell and Ramirez, and tie the recovered firearm back to Galeana, there was no violation of the Defendant's confrontation rights. Their convictions should be upheld.

2. The Defendants were not denied unanimous jury verdicts because the jury expressed unanimity in a special verdict and evidence supported each alternative of the crimes. (Ramirez' assignment of error #1 and Galeana's assignment of error I.)

The Defendants[4] claim there was insufficient evidence to support some of the alternatives they were charged with, so their right to a unanimous jury verdict might have been violated. In making this argument the Defendants ignore that there were special verdicts returned in each of the counts they complain of in the form of deadly weapon special verdicts. Further, there was sufficient evidence adduced at trial to support each alternative. Even if this weren't the case, the Defendants failed to preserve this issue at the trial court level because they did not request the jury be instructed to deliver special verdicts.

The jury expressed unanimity through the special verdicts for the sentencing enhancements.

Defendant Galeana claims that his right to a unanimous jury verdict might have been violated as regards to his count 1. The jury were instructed that they could convict Galeana of his count 1 if they found that either he was either armed with a firearm, or inflicted great bodily harm. *Id*. at 107. The jury were instructed they need not be unanimous as to

[4] Defendant Russell adopts Ramirez and Galeana's assignments of error by reference. Both are applicable to him, as his counts were identical to Ramirez and Galeana's.

which of the two alternatives they agreed upon, so long as they all agreed upon one or the other. *Id*.

The jury were also asked to consider whether Galeana was armed with a firearm during the commission of count 1 for purposes of a firearm sentencing enhancement. Galeana's CP at 119.[5] The jury were told that they must be unanimous to return an answer of either "yes" or "no." *Id*. The jury convicted Defendant Galeana of count 1, and returned a special verdict that Defendant Galeana was armed with a firearm during the commission of count 1. Galeana's CP at 126. Therefore, the jury was unanimous that Galeana committed the charge while armed with a firearm, unanimously satisfying one of the alternatives.

Defendant Russell was likewise charged in the shooting of Mr. Morales in his count 4, and the jury was instructed the same way. Supp. CP at 467. The jury also returned a special verdict, voting unanimously that Russell was armed with a firearm. Supp. CP at 213. This shows that all jurors agreed that Russell was armed with a firearm during the commission of that crime. The jury was unanimous.

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[5] Defendant Ramirez and Galeana each submitted separate Designations of Clerk's Papers, and those papers are separately numbered, each starting with 1. Defendant Russell submitted a "supplemental" and "second supplemental" designation, and those papers were apparently numbered sequentially beginning after Galeana's. Therefore, Russell's papers will be referred to as "Supplemental" and Ramirez and Galeana's by their names.

The jury answered similar special verdicts with regards to the robbery and attempted robbery charges Defendant Ramirez complains of. For those charges, however, the jury unanimously answered "no," that Defendants Russell and Ramirez were not armed with a firearm. Ramirez' CP at 94 & 96; Supp. CP at 217 & 219. Because the jury unanimously found that Defendants Russell and Ramirez were not so armed, this court can be satisfied that the jury convicted on the alternative of the infliction of bodily injury, of which there was uncontroverted evidence. Once again, the special verdict forms show that the Defendants' claims are unsupported.

There was evidence that Defendants Russell and Ramirez were armed with a pistol when they beat up and robbed Mr. Leiva and Mr. Morales.

Criminal defendants in Washington "have no right to unanimity as to means so long as all means alleged are (1) supported by sufficient evidence and [are] (2) 'not repugnant' to one another." *State v. Woodlyn*, 188 Wn.2d 157, 164, 392 P.3d 1062, 1066 (2017) (citing *State v. Arndt*, 87 Wn.2d 374, 378-79, 553 P.2d 1328 (1976).) Only when a specific due process concern is raised does jury unanimity in alternate means cases become an issue. *Id*. Specifically, if a reviewing court cannot rule out the possibility that the jury convicted on the means that was unsupported by

the evidence, the jury should have expressed which of the alternate means it relied upon to reach its decision. *See Id*. Essentially, this is a sufficiency of the evidence challenge made to one element of a crime with alternate means.

"A general verdict satisfies due process only so long as each alternative means is supported by sufficient evidence." *Id*. at 165. "The evidence is sufficient if 'after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt'." *State v. Armstrong*, 188 Wn.2d 333, 341, 394 P.3d 373, 377 (2017) (quoting *Ortega-Martinez*, 124 Wn.2d 702, 881 P.2d 231 (1994).) The general verdict will stand if the reviewing court can rule out the possibility that the jury relied upon a charge unsupported by sufficient evidence. *Woodlyn* at 165.

Russell and Ramirez' claims of insufficient evidence also fail because there was substantial evidence of a pistol at the scene of the robbery and assault upon Mr. Leiva and Mr. Morales.

In the instant case Nicole Smith, one of the witnesses to the assault, testified that Mr. Leiva and Mr. Morales were saying "pistol" when they asked her to call for the police immediately after the attack. RP

6/29/2016 at 20. Mr. Morales said that he was hit in the head with something like metal. RP 6/29/2016 at 93. Mr. Leiva said that the assailants had something black, like a weapon. RP 6/30/2016 at 95. When asked if the assailants hit him with a knife or a gun, Mr. Leiva said it was "a[n] arm." RP 6/30/2016 at 96. During cross-examination, Mr. Leiva would say that the black object he saw in the hands of one of his assailants was "an arm." When asked about seeing a gun, Mr. Leiva said, "Yes. I saw like a weapon, like an arm in his hand and I assumed it was a - an arm." RP 6/30/2016 at 149. Later, Mr. Leiva said that he had told the police that he had seen a gun in the hands of the attackers. *Id*. at 145-46.

Clearly, "arm" was not an appendage, but an object. *Id*. at 149-50. Given Ms. Smith's testimony that Mr. Leiva and Mr. Morales were excitedly saying "pistol" when they asked her to call the police, it is clear that Mr. Leiva meant that the assailants were armed.

The Defendants may dismiss this as a speculative interpretation. However, insufficiency claims "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068, 1074 (1992) (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).) In this matter, there were obvious language and

culture barriers throughout the testimony of Mr. Leiva and Mr. Morales that demonstrate that this is not just conjecture. An interpreter testified that she had great difficulty in interpreting for the two men. RP 7/6/2016 at 538. Both Mr. Morales and Mr. Leiva described the assault as a "problem." Mr. Morales used slang words that the interpreter could not identify, such as *putazo*. RP 6/29/2016 at 102-05. Great time was given to the meaning of the word "*guero*." *See* RP 6/29/2016 at 118-19 and RP 7/6/2016 at 539-40. Mr. Morales said that four people had a gun, but when asked how many people had a gun *in their hands* he said only one. RP 6/29/2016 at 106.

Having an arm in one's hand makes no sense. What is imminently more likely is that Mr. Leiva meant that the assailants were armed with a metal object that was used to *putazo* his compadre, and that object was a pistol, as Mr. Morales and Mr. Leiva excitedly said to Ms. Smith on the night of the incident.

Substantial evidence supports a finding of great bodily harm because a gunshot wound to the torso is potentially life threatening.

In his claim of insufficient evidence to support the alternative of the infliction of great bodily harm, Defendant Galeana ignores much of the evidence at trial and the reasonable inferences that may be drawn therefrom.

"Great bodily harm" means "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c).

In *State v. Langford* the defendant was charged with first-degree assault of Conan Northwind after he stabbed Northwind in the chest. *State v. Langford*, 67 Wn. App. 572, 577, 837 P.2d 1037, 1040 (1992). The trial court instructed that "A person commits the crime of assault in the first degree when he, with intent to inflict great bodily harm, assaults another with a deadly weapon or by any means likely to produce great bodily harm or death." *Id* at 586. The defendant challenged the court's instructions as unconstitutionally vague, claiming that even a punch in the nose carries a probability of death. *Id*. at 586-87. Division 3 of this court disagreed, finding that even if the statute was potentially vague, a stabbing to the chest was obviously within the "hard core" of the statute. *Id*. at 587 (citing *State v. Maciolek,* 101 Wn.2d 259, 266, 676 P.2d 996 (1984).)

Although the legal issue is different, *Langford* is instructive. A .38 gunshot wound to the torso, like a stab to the chest, is clearly within the "hard core" of injuries that can constitute great bodily harm.

In the instant case, Mr. Leiva suffered a "through and through" gunshot wound. RP 7/1/2016 at 228. Rather than a "glancing gunshot wound," the police at first thought that he had been hit twice. *Id*. He was rushed to the hospital. RP 7/1/2016 at 229-30. When Detective Cox responded to the hospital the next morning, Mr. Leiva was still in bed. RP 7/1/2016 at 322. No one could reasonably argue that a .38 gunshot wound that passed through a person's torso could not create a probability of death.

The evidence presented regarding Mr. Leiva's gunshot wound was sufficient to send the issue to the jury. The trial court's decision should be left undisturbed and the conviction should be upheld.

This error is not preserved for appeal.

None of the Defendants requested the court instruct the jurors to return special verdicts for the alternate charges. RP 7/6/2017 at 500-06. Neither Russell nor Ramirez even asked the court to dismiss the alternatives for lack of evidence. *Id*. They did not object to the inclusion of the alternative in the jury instructions. RP 7/6/2016 at 576-77. They now ask this court to review a decision that the trial court did not have the opportunity to make.

"The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a 'manifest error affecting a constitutional right.'" *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84, 89 (2011) (quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009).) "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251, 1256 (1995), *as amended* (Sept. 13, 1995). "On the other hand, 'permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts'." *Id*. (quoting *State v. Lynn*, 67 Wn. App. 339, 342, 835 P.2d 251 (1992), emphasis in original.)

The Defendants failed to preserve the issue of the sufficiency of the evidence for the crimes with alternate means when they failed to raise the issue to the trial court, which was in the best position to evaluate the evidence that had been admitted. Nor do they do not show any "manifest" constitutional error because there is no prejudice in the record. Therefore,

the issue is not preserved for appeal and this court should not consider the assignment of error.

3. Defendants Russell and Ramirez' convictions for Robbery in the First Degree and Assault in the Fourth Degree do not merge because the assault was greater than a use of force (Russell's assignment of error #2 & Ramirez' assignment of error #4.)

The Defendant claims that the convictions for Assault in the Fourth Degree and Robbery in the First Degree merge.[6] However, here the assaults committed against Mr. Leiva and Mr. Morales, which were intentional batteries, had separate purpose and effect, a finding the trial court specifically made.

The assault here had separate purpose and effect.

In the instant case the intentional batteries inflicted upon the victims by Defendants Ramirez and Russell was beyond the force needed to facilitate a robbery.

In *State v. Frohs* the defendant was convicted of Unlawful Imprisonment and Assault in the Fourth Degree. *Frohs* at 804. He appealed his conviction, claiming that the merger doctrine caused the two charges to merge. *Id*. Division I of this court disagreed. The *Frohs* court noted that none of the three methods of accomplishing unlawful

[6] Defendant Galeana adopts the assignments of error of his co-defendants, but he was not charged in the robberies or assaults, so the issue is inapplicable to him.

imprisonment, "physical force, intimidation, or deception" required proof of any of the three alternative methods of committing an assault. *Id*. at 813-14. The court rejected the defendant's contention that the two crimes merged. *Id*. at 816.

This is analogous to the situation here. Although robbery requires the use of force, it does not require an intentional battery. Therefore, the crimes do not always merge as a matter of law.

Defendant Russell cites to *State v. Keir*, but that case is factually dissimilar enough to be inapposite. In *Keir* the defendant used a firearm to force a person out of a car that he then stole. *State v. Kier*, 164 Wn.2d 798, 803, 194 P.3d 212, 213 (2008). In that case, use of the firearm elevated the robbery, and also constituted a second-degree assault. *Id*. at 806. In that case, there was no battery and no injury; rather, the use of force was the use of the firearm (a threat of violence or menace, but also a common law assault), and no battery occurred. *Id*.

The Defendants also rely on *State v. Freeman*. In *Freeman* the defendant shot his victim when the victim refused to hand over his valuables. *State v. Freeman*, 153 Wn.2d 765, 769, 108 P.3d 753, 755 (2005). The defendant then took the property anyway. *Id*. In the joined case of *Zumwalt*, defendant Zumwalt punched the victim hard in the face,

knocking her to the ground, and then took $300 in cash and casino chips. *Id*. at 770.

Our Supreme Court ruled that the second degree assault in the *Zumwalt* case merged, but the *Freeman* assault did not. The court ruled that first degree robbery and second degree assault "a will merge unless [the two crimes] have an independent purpose or effect." *Id*. at 780. The court noted *Frohs*, *supra*, and *State v. Prater*, 30 Wn.App 512, 635 P.2d 1104 (1981).

As the witnesses described and the video shows, the assault was prolonged and involved multiple strikes to the victims, even after they had attempted to fight back. Witness Aaron Johnson said that the assailants "were hitting them full feet, fist. They were just kicking and hitting them." RP 6/29/17 at 48.

The trial court made findings that these assaults had separate purpose and effect. At Defendant Ramirez' sentencing the trial judge specifically ruled that the assault charges would be consecutive because the judge found that Ramirez "just kept beating on him rather than leaving" when it became clear that they weren't going to get anything from the robbery. RP 7/29/2016 at 14.

This court should uphold the trial court's finding that the assault in the fourth degree courts are independent crimes that do not merge with the robbery and attempted robbery.

Assault in the Fourth Degree does not require bodily injury be inflicted.

Defendant Ramirez argues that the fourth-degree assault "elevated" the robbery and attempted robbery charges to first degree – but that is inaccurate. The infliction of bodily injury (which need not be intentionally inflicted)[7] is what elevated the crime. *See* Ramirez' CP at 42, 43. A fourth-degree assault does not require an infliction of bodily injury. *See* RCW 9A.36.041.

4. Defendant Russell's Judgment & Sentence contains a scrivener's error listing the firearm enhancements as on Counts 1 & 2 on one page rather than 3 & 4 (Russell's assignment of error #3.)

Defendant Russell's third assignment of error is only the result of a scrivener's error in the Judgment & Sentence.

As stated above, the jury answered "yes" to the special verdict question of whether the Defendant was armed with a firearm for Russell's counts 3 & 4. The Judgment & Sentence included an additional five years on counts 3 and 4 for these two sentence enhancements, as is accurately

[7] And the allegation of the use of a firearm, which the jury ultimately decided had not been proven.

reflected in section 2.3 and 4.1(a) of Russell's Judgement & Sentence. CP at 186 & 188. However, in section 2.1 of the Judgment & Sentence, the counts with firearm enhancements are mistakenly listed as 1 & 2.[8] CP at 185. The overall length of the Defendant's sentence is therefore correct.

The section on which there is a scrivener's error appears to have no executory language, or any effect which would prejudice the Defendant. Rather, it appears to be a sort of "flag" to alert the reader of the condition elsewhere in the document. The Sentence and Order section (IV) correctly lists the enhancement on Counts 3 and 4. Any error is harmless.

If this court finds that the record should be corrected, the remedy should simply be to correct the Judgment & Sentence document.

5. These three cases were properly consolidated for trial because the facts were inextricably intertwined (Ramirez' assignment of error #2).

Defendant Ramirez claims that he was unfairly prejudiced by having his case joined to Defendants Russell and Galeana.[9] He claims a gross disparity of evidence prejudiced him. However, the disparity was the *type* of evidence rather than the amount. Further, the facts of the case

[8] Defendant Russell's Count 3 & 4 (Assault in the First Degree) were his co-Defendant Daniel Galeana's' Count 1 & 2, which may have led to this error.

[9] Defendants Russell and Galeana adopt this assignment of error by reference.

were so inextricably intertwined that these cases were properly consolidated for trial.

Standard of review of a denial of a motion to sever.

Separate trials are disfavored in Washington. *State v. Asaeli*, 150 Wn. App 543, 583, 208 P.3d 1136 (2009) (citing *State v. Dent,* 123 Wn.2d 467, 484, 869 P.2d 392 (1994).) A trial court's denial of a motion to sever is reviewed for abuse of discretion; that is, when its decision is manifestly unreasonable or based on untenable grounds. *Id*. (citing *State v. Lane,* 56 Wn. App. 286, 298, 786 P.2d 277 (1989) and *State v. Perrett,* 86 Wn. App. 312, 319, 936 P.2d 426 (1997).) A defendant must be able to point to specific prejudice to support the claim of abuse of discretion. *Id*. (citing *State v. Wood*, 94 Wn. App. 636, 641, 972 P.2d 552 (1999).)

The evidence against Ramirez was circumstantial rather than direct, but was not grossly disparate in the amount.

Defendant Ramirez claims that a gross disparity of evidence between he and his codefendants, which prejudiced him. This argument appears to be based on the fact that there were eyewitness identifications of Russell and Galeana, whereas his identity and involvement was proved circumstantially. In short, the disparity was of the *kind* of evidence not the amount. Circumstantial evidence is not more or less reliable than direct

evidence. *See State v. Gosby*, 85 Wn.2d 758, 767, 539 P.2d 680, 685 (1975).

Defendant Ramirez' identity was circumstantially proven. He was seen at the hospital with Defendant Russell, who was identified as one of the assailants. Ramirez was at the hospital because he had a stab wound to his side, and Mr. Morales stated that he defended himself from the assailants with a knife. The eyewitnesses to the robbery and assault, Ms. Smith and Mr. Johnson, said the other assailant was wearing an oversized black "hoodie," and an extra-large black hooded sweatshirt with a hole and a blood stain on it was seized from Defendant Ramirez' hospital room by Sgt. Wagonblast, who testified that Ramirez probably wore a medium.

Further, the State identified Ramirez as "Silent" based on his tattoo and phone number, and the text messages in Russell's phone indicate that Russell had invited "Silent" to "come drink a beer" a few hours before the incident.

Defendant Galeana, identified as the shooter, was spotted joining Russell and Ramirez at the hospital, then disappeared about 20 minutes before the shooting. Galeana was then seen picking Ramirez up from the hospital the next morning, further linking Ramirez to the events, and implying that the shooting was retaliation for Ramirez' wound.

In short, there was quite a bit of evidence that Ramirez was the second assailant, just not an eyewitness identification. The evidence against Ramirez was circumstantial, but in no way was there a "gross disparity." The evidence against Defendant Ramirez was simply of a different type. The cases were properly joined.

Evidence of the shooting was relevant to Defendant Ramirez' case.

Defendant Ramirez also argues that evidence of the shooting incident (for which Russell and Galeana were convicted) unfairly prejudiced him because if he had been tried alone, that incident would have been omitted from his trial. This is speculative and incorrect. Ramirez is, in fact, the central figure in the entire sequence of events. He provides the motive for the shooting and solves the mystery of the second unidentified robber/assailant.

Defendant Ramirez argues that evidence of the shooting was likely to arouse an emotional response in the jury, and this led to his prejudice. This is speculative and, even if correct, of questionable significance given that the assault and robbery of two men innocently walking down an alleyway is just as likely to arouse an emotional response. However, there was no evidence presented that Defendant Ramirez condoned, encouraged, or even knew about the shooting. The State even argued to the jury that it

was impossible to know if Defendant Ramirez was involved. RP 7/7/2016 at 716-18.

In sum, the shooting was probative and more circumstantial evidence of Ramirez' identity as the unidentified assailant and robber. Even in a standalone trial, such evidence would doubtless be presented to prove Ramirez' culpability in the robbery and assault. There was no error. The convictions should be upheld.

The evidence in this case was inextricably intertwined.

Defendants Galeana and Russell also assert, by referencing Ramirez' assignment of error, that they were prejudiced. However, the facts of these two incidents are inextricably intertwined and would be impossible to separate. Without evidence of the stabbing, there is no motive for the shooting. Evidence of the shooting is relevant to prove Defendant Ramirez' identity. And Defendant Russell is the common thread, since he was proven to be at both incidents.

A trial of any one of the three Defendants would necessarily include evidence of both incidents. There was no prejudice to any one of the three co-defendants in this case. The convictions should be upheld.

6. There was no cumulative error that rendered the trial unfair (Ramirez' assignment of error #5.)

Defendant Ramirez contends that cumulative error resulted in an unfair trial which violated his due process rights. Defendants Galeana and Russell adopt this argument as well. Since the State does not agree that any of the assignments of error were in fact errors, the State disagrees with the contention that cumulative error requires reversal of the conviction.

7. There was no error when the police testified that they found a pistol that turned out to be the firearm used in this shooting (Galeana's assignment of error II.)

Defendant Galeana assigns error to testimony that linked him to the firearm that was used in the commission of the shooting.[10] It is unclear what error or prejudice is being alleged, but he appears to argue that such evidence was more prejudicial than probative. To any extent there was such error, it was not raised below and is not preserved for appeal. In any event, the evidence was probative to link Defendant Galeana to the firearm that was recovered, purely by chance, two weeks after the shooting.

[10] Defendant Russell adopts this assignment of error.

Evidence that linked Defendant Galeana to the firearm was circumstantial evidence that Defendant Galeana was the shooter.

Errors must be objected to at the trial court level for the reasons discussed above. This error is not preserved for appeal because the Defendant did not object at the time the evidence was presented. Therefore, this court should not consider the assignment of error.

Evidence that linked Defendant Galeana to the firearm was circumstantial evidence that Defendant Galeana was the shooter.

If this court does consider this assignment of error, it should find that the evidence was probative to link Defendant Galeana to the revolver that was used in the shooting, providing circumstantial evidence of Defendant Galeana's culpability.

The State produced an expert witness to establish that the .38 special revolver recovered by the police was the firearm used to shoot Mr. Leiva and Mr. Morales. RP 7/6/2016 at 480. That firearm was recovered by happenstance by Officer Capps two weeks after the shooting, in a case that was totally unrelated to the instant case. RP 7/6/2016 at 437-38. In order to explain why the Aberdeen Police sent this particular revolver to the crime lab to be compared with this shooting, and to introduce more circumstantial evidence linking Defendant Galeana to the pistol, the State introduced testimony by Officer Capps regarding the recovery, and from

the cell phone linking Defendant Galeana to the parties involved in the recovery.

How this evidence is unduly prejudicial is unclear. The argument appears to be that prejudice stems from associating Defendant Galeana with Rigo Rivera, who was later issued a citation in connection with the weapon. However, Defendant Russell's cell phone contained communications to and from Defendant Galeana and Rivera, indicating that they all knew each other - which is the point. The evidence links the firearm to Defendant Galeana through Rivera, implying that Galeana handed the pistol off to a known associate after using it in the shooting. This is probative evidence. There was no error.

8. Evidence that the Defendant was a suspect is not irrelevant or improper, therefore Defendant Galeana's counsel was not ineffective (Galeana's assignment of error III.)

Defendant Galeana[11] next complains that testimony that he was arrested for this incident was tantamount to an officer giving an opinion as to his guilt. He is factually incorrect about what the officer said. Further, he fails to establish either deficient performance or prejudice, so his ineffective assistance claim fails.

[11] Although Defendant Russell adopted this assignments of error as well, it would appear to be specific to only Defendant Galeana's case.

Standard for Ineffective Assistance.

The Washington State Supreme Court has adopted the two prong *Strickland* test for analysis of the effectiveness of a defense counsel performance. See *State v. Jeffries*, 105 Wn.2d 398, 417, 717 P.2d 722, 733 (1986). Ineffective assistance of counsel is a fact-based determination…" *State v. Carson*, 184 Wn.2d 207, 210, 357 P.3d 1064, 1066 (2015) (citing *State v. Rhoads*, 35 Wn. App. 339, 342, 666 P.2d 400 (1983).) Appellate courts "review the entire record in determining whether a defendant received effective representation at trial." *Id.*

Strickland explains that the defendant must first show that his counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel's errors must have been so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel's performance is guided by a presumption of effectiveness. *Id.* at 689. "Reviewing courts must be highly deferential to counsel's performance and 'should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Carson* at 216 (quoting *Strickland* at 690.)

The defendant must also show that the deficient performance prejudiced the defense. *Strickland* at 687. The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* For prejudice to be claimed there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

The defendant bears the "heavy burden" of proof as to both prongs. *Carson* at 210. If both prongs of the test are not met then the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Strickland* at 687.

There was no deficient performance and no prejudice.

Defendant Galeana claims that Officer Green rendered an opinion as to his guilt by telling the jury he had probable cause to arrest. In fact, Officer Green merely testified that *he was told* that there was probable cause to arrest the Defendant, and was present at the arrest. RP 7/1/2016 at 265. Defendant Galeana's trial counsel objected to the admission of this testimony as hearsay, but the objection was overruled when the State

pointed out that the testimony was not offered for the truth of the matter. *Id*.

In making this claim the Defendant fails to point to any case that establishes that evidence of a defendant's arrest is prejudicial or irrelevant. Indeed, a jury would think it strange that a defendant, who was identified as the suspect in a shooting (as was established by prior testimony), and who was now on trial, wasn't arrested at some point. In short, evidence of an arrest, while not necessary in a criminal case, is unremarkable. Galeana fails to establish deficient performance.

The assertion that this brief testimony concerning the Defendant's arrest, which takes up less than a page of transcript, was so overwhelming to the jury that they had no other choice but to vote guilty, all based upon one officer who testified for only a few minutes, ignores the rest of the record. The jury could also imply that the police believed Defendant Galeana guilty because of the testimony that Mr. Leiva identified Defendant Galeana as the shooter to Detective Cox. Or that Officer Perkinson locked down the hospital when Mr. Leiva and Mr. Morales came in as gunshot victims because he suspected that Defendant Ramirez, still in the ER from the stab wound, was involved. RP 6/30/2017 at 179.

However, none of this testimony is alleged to be unduly prejudicial. Galeana fails to establish prejudice.

Defendant Galeana fails to establish ineffective assistance just because a police officer testified that he was told to arrest him because he was told there was probable cause. There is no evidence that the jurors even know what the term "probable cause" means. His counsel did make a hearsay objection that was overruled. It cannot be said that he was ineffective. The conviction should be upheld.

9. RAP 14.2 governs award of costs (Galeana's assignment of error IV.)

Finally, Defendant Galeana asks this court not to impose costs due to his indigence. This assignment of error was adopted by Defendant Russell. However, RAP 14.2 (amended January 31, 2017) governs awards of costs, and because all three co-defendants were found to be indigent, that presumption will continue.

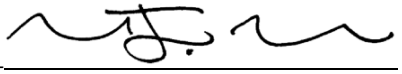
Further, the State has not requested costs. This matter should be deferred unless and until there is a request for costs and evidence that a defendant's financial circumstances have significantly improved.

CONCLUSION

As with any trial with three codefendants, two separate incidents, twelve charges, and two witnesses who required interpreters, this case was long and the record voluminous. However, the rights of all three Defendants were respected and no manifest error requires reversal. Defendant Russell's Judgment & Sentence, however, does contain a scrivener's error that does not change the length of his sentence. This court should uphold the convictions of all three codefendants and allow the issue of costs to be dealt with in accordance with RAP 14.2.

DATED this _____ day of November, 2017.

Respectfully Submitted,

BY: 

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